

NOTES

OHIO'S UNIFORM EMINENT DOMAIN ACT: TRANSFER OF TITLE AND POSSESSION

The enactment of the Ohio Uniform Eminent Domain Act by the last general assembly revolutionized eminent domain procedure in Ohio.¹ The act has been designated the Uniform Eminent Domain Act because its primary purpose is to provide a uniform judicial proceeding whenever private property is taken for public use.² The purpose of this note is to examine the objectives of the act and to evaluate provisions relating to transfer of title and possession in terms of these objectives.³

I. OBJECTIVES OF THE ACT

In order to understand the objectives of the act, it is first necessary to appreciate the function of the courts in the exercise of eminent domain. Essentially, eminent domain is the taking of private property for public use without the consent of the owner.⁴ Hence, the law of eminent domain represents an attempt to reconcile a fundamental conflict between private property owners and the power of the state. This conflict is clearly recognized in article I, section 19 of the Ohio Constitution which provides: "Private property shall ever be held inviolate, but subservient to the public welfare." Since the exercise of eminent domain does produce such direct conflict between private property and the power of the state, it comes as no surprise that the judiciary has traditionally played an important role in its exercise. At one time the judiciary was the primary arbiter of the conflict. Armed with the concept of public use, it determined when the public interest

¹ Amended Senate Bill No. 94 enacted §§ 163.01-.22, amended one hundred and ten sections, and repealed one hundred and four sections of the Ohio Revised Code effective January 1, 1966.

² Ohio Rev. Code § 163.02 provides: "All appropriations of real property, except as otherwise authorized by this section, shall be made pursuant to §§ 163.01 to 163.22, inclusive of the Revised Code."

The exceptions set forth in § 163.02 permit the director of highways to appropriate pursuant to §§ 5519.01-.06; a conservancy district to appropriate pursuant §§ 6101.01-.84; and a sanitary district to appropriate pursuant to §§ 6115.01-.79 of the Ohio Revised Code. It is hoped that each of these agencies will choose to utilize the uniform procedure so that complete uniformity can be attained.

³ For a thorough section by section analysis of the act, see Kirkwood, Ohio Uniform Eminent Domain Act (1966).

⁴ 1 Nichols, Eminent Domain § 1.11 (3d ed. 1964).

required that a man's property be wrested from him.⁵ Since that time, public use has become almost entirely a legislative or administrative question.⁶ This change in the judiciary's role resulted partly from the general acceptance of new ideas about the proper relationship between the judiciary and the other branches of government. But also, the need for public land has rapidly increased under the pressure of expanded governmental services, urban renewal projects, and highway construction. As a result, the determination of public need has arguably become too complex for the judicial process. Although the judiciary may no longer be responsible for determining when private property shall be converted to public use, it still plays an important role in the exercise of eminent domain. In the first place, the Ohio Constitution, like many other state constitutions, requires that a land owner be justly compensated for his property and that the amount of compensation be determined by a jury.⁷ Thus, the courts are entrusted with the function of ensuring that a land owner is paid just compensation for his property. The courts have also been delegated the equally important function of administering the transfer of title and possession from private persons to the appropriating agency. The performance of this second function by the courts is required because the exercise of eminent domain is an involuntary transfer of property. While a voluntary transfer can be administered by the parties themselves, the involuntary transfer requires the intervention of the court to harmonize the competing interests of the parties. Both the function of administering the transfer of title and possession and the function of ensuring just compensation require balancing the interests of land owners and the public. The courts are responsible for striking the proper balance.

The functions of the judiciary are carried out within the framework of an appropriation proceeding prescribed by the legislature. The appropriation procedures in existence prior to the effective date of the recent Ohio act demonstrated that unfair and inefficient procedures could prevent the courts from properly performing their functions. An examination of the state of the law prior to the passage of the new act

⁵ Nichols, "The Meaning of Public Use in the Law of Eminent Domain," 20 B.U.L. Rev. 615 (1940).

⁶ State *ex rel.* Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951).

The determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts when abused, and the determination of the legislative body of that matter should not be reversed except in instances where such determination is palpably and manifestly arbitrary and incorrect. *Id.* at 92, 100 N.E.2d at 231. See Comment, "The Public Use Limitation on Eminent Domain: An Advance Requiem," 58 Yale L.J. 599 (1948).

⁷ Ohio Const. art. I, § 19 and art. XIII, § 5.

reveals the reasons for its enactment. The Ohio legislature had granted the power of eminent domain to fifteen different private and governmental agencies.⁸ The number and variety of appropriation procedures used by these agencies had multiplied haphazardly as the need for public lands grew. At the time of the enactment of the Uniform Act there were fourteen separate, distinct, and complete procedures by which eminent domain could be exercised,⁹ making it difficult for landowners and appropriating agencies to know whether they were following the correct procedure.¹⁰ Litigation over procedural technicalities was excessive. The number and variety hindered the evaluation of the procedures and encouraged their misuse. For these reasons the Ohio Legislative Service Commission and the Eminent Domain Committee of the Ohio Bar Association recognized the need for a uniform procedure which could be used whenever eminent domain was exercised.¹¹ Furthermore, sentiment for reform was created by outdated procedures which produced bottlenecks in important public projects and which levied undue hardships on land owners.¹² The recognition of the need for uniformity and reform culminated in the enactment of Ohio's Uniform Eminent Domain Act. Whether the act permits the courts to perform properly their functions of ensuring just compensation and administering transfer of title and possession is yet to be determined.

Since the fairness and efficiency of Ohio's Uniform Act are deter-

⁸ Ohio Legal Center Instit., Reference Manual for Real Estate Conference III: Eminent Domain 1.01 (1966).

⁹ Ohio Legis. Serv. Comm'n, Research Report No. 14, Eminent Domain in Ohio 4 (1956).

¹⁰ The Legislative Service Commission concluded: "Ohio's Eminent domain law is confusing even to the most experienced lawyer because it consists of hundreds of sections scattered throughout the Revised Code." *Id.* at 3.

¹¹ The Ohio Legislative Service Commission recommended the adoption of a uniform procedure in its research report on the law of eminent domain submitted in 1956. Research Report No. 14, *op. cit. supra* note 9, at 16. The eminent domain committee of the Ohio Bar Association then undertook the task of drafting the proposed bill and urging its enactment. Kirkwood, *op. cit. supra* note 3, at 2. Several other states have also recently felt the need for a uniform procedure. See, e.g., Kentucky Research Comm'n, Research Report No. 24, Eminent Domain Procedure (1965); Joint State Gov't Comm'n, Pennsylvania Proposed Eminent Domain Law (1962); Virginia Advisory Legis. Council, House Document No. 11, Revision of Eminent Domain Laws (1961); Comment, "Modernizing Illinois Eminent Domain Procedures," 48 Nw. U.L. Rev. 484 (1953).

¹² Ohio Legis. Serv. Comm'n, *op. cit. supra* note 9, at 13: Comment, "Eminent Domain: Corduroy Road to Ohio's Super Highways," 9 W. Res. L. Rev. 457 (1958). For examples of the recent movement for reform in other states see the articles and pamphlets cited in note 11, *supra*. See also California Law Revision Comm'n, Possession and Passage of Title in Eminent Domain Proceedings (1960); Highway Research Board, Special Report No. 32, Condemnation of Property for Highway Purposes (1958).

mined by balancing the competing interests of landowners and appropriating agencies, it is important that these interests be understood. If either party is able to use the proceeding as a club to coerce an unjust settlement, the purpose of the proceeding is defeated. Likewise, neither party should be afforded an unfair advantage in presenting its case to the jury. The appropriation agency is interested in immediate possession of the property so that it can begin improving and using the property without the delay caused by litigation. Owners, on the other hand, want adequate time to relocate. The agency seeks to minimize the cost of appropriation, while the landowner generally feels that the agency's offers are wholly inadequate. The task confronting the draftsmen of the Ohio act was to blend these competing interests into a fair and efficient proceeding.

The Ohio Constitution provided the foundation upon which the act was built. The constitution requires that compensation be assessed by a jury.¹³ Therefore, one objective of the act is to provide procedures which will increase the probability of a fair and just assessment. The constitution also places restrictions upon the time at which the property can be transferred to the appropriating agency.¹⁴ Except for two specified instances, compensation must be assessed by a jury and paid or secured by deposit before the agency may take possession of the property. An agency may take possession before trial only when the property is "taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads which shall be open to the public without charge."¹⁵ Therefore, a second objective of the Uniform Act is to transfer property to the appropriating agency as quickly as the constitution and a fair consideration of the owner's interests will permit. The succeeding paragraphs will examine the provisions of the act relating to transfer of title and possession and will suggest an interpretation of those provisions which will be consistent with the objectives of the act.

II. TIME, CONDITIONS, AND EXTENT OF POSSESSION

The voluntary transfer of property by sale or gift is a relatively simple operation because it is based upon the mutual agreement of the parties. But a transfer pursuant to an exercise of eminent domain is more complex because it is an involuntary transfer carried out within the framework of a judicial proceeding. The complexity is enhanced by the necessity of balancing the agency's need for imme-

¹³ Ohio Const. art. I, § 19 and art. XIII, § 5.

¹⁴ Ohio Const. art. I, § 19 and art. XIII, § 5.

¹⁵ Ohio Const. art. I, § 19.

diate possession against the owner's need for a reasonable time to relocate. The first questions which will be considered are at what time, upon what conditions, and to what extent may an appropriating agency take possession of property under the Uniform Act.

A. *Preliminary Surveys*

An appropriation proceeding is commenced when an agency files a petition in the common pleas or probate court of the county where the land is situated.¹⁶ The first question considered is to what extent the agency can enter upon the land before it files its petition. Often the agency needs to make surveys for the preparation of plans and appraisals for use in negotiations with the owner. Can entries be made for these purposes before the appropriation proceeding is formally commenced? Section 163.03 provides that if the agency gives the required notice, its entry for such purposes will not constitute a trespass. Nevertheless, it must reimburse the owner for any actual damage caused by the entry. If the agency and owner are unable to agree upon the amount of damages, the owner may seek to recover his losses in a separate action. This right to make preliminary surveys is valuable to the agency, but the courts should not permit it to be abused. The landowner should be permitted as much privacy as the public interest will permit.¹⁷ Hence, he should be able to recover damages for trespass if he is not given proper notice or if the entry is unnecessary. This interpretation of section 163.03 conforms with the rule that a statute in derogation of personal or property rights should be strictly construed.¹⁸ Furthermore, the agency should not be permitted to leave its equipment on the land any longer than is necessary to accomplish a purpose permitted by the statute. Arguably, such action would constitute a temporary taking.¹⁹ If there is a taking, the constitution requires that the owner be compensated.²⁰ If section 163.03 were construed to limit a landowner's right to be compensated for a taking, it would violate the constitution.²¹

B. *Immediate Possession*

The next question considered is how soon after it files its petition may the agency take possession of the property. The Uniform Act incorporates the restrictions upon immediate possession contained in

¹⁶ Ohio Rev. Code Ann. §§ 163.01(B) and .05 (Page Supp. 1965).

¹⁷ Ohio Legis. Serv. Comm'n, *op. cit. supra* note 9, at 9.

¹⁸ 50 Am. Jur. *Statutes* §§ 399, 400 (1944).

¹⁹ *Schneider v. Brown*, 33 Ohio App. 269, 169 N.E. 307 (1929).

²⁰ Ohio Const. art. I, § 19 and art. XIII, § 5.

²¹ *Miami Conservancy Dist. v. Bowers*, 100 Ohio St. 317, 125 N.E. 876 (1919).

the constitution.²² Thus, section 163.06 permits the agency to take possession before trial only when land is imperatively needed in time of war or other public exigency or when it is taken for the purpose of making or repairing roads open to the public without charge. In all other situations the agency may not take possession until compensation has been assessed by the jury, the amount of the verdict has been paid to the owner or deposited with the court, and an order granting possession to the agency has been entered by the court.²³

Even if an agency is permitted by the constitution to take immediate possession, it may not do so until it has complied with the requirements of section 163.06. The first requirement is that the agency must file a declaration of intention with its petition. The purpose of the declaration is to give the court and the owner notice of the agency's desire to take immediate possession. If the agency does not desire immediate possession it need not file a declaration. But if it does file, it should be bound by its manifestation of intention.²⁴ The owner should be entitled to know what the agency intends and to rely upon its manifestations of intention so that he can adjust his relocation plans accordingly. Although section 163.06(B) expressly provides for the filing of a declaration in the case of a taking for the purpose of making or repairing roads, section 163.06(A) fails to mention the declaration in the case of a taking in time of war or other public exigency. Since the reasons for filing a declaration are equally persuasive in both cases, the failure to mention the declaration in the latter instance was undoubtedly a legislative oversight.²⁵ A declaration should be required whenever an agency takes immediate possession.

²² Ohio Const. art. I, § 19 and art. XIII, § 5.

²³ Ohio Rev. Code Ann. § 163.15 (Page Supp. 1965).

²⁴ For example, § 163.21 provides that if an agency abandons the proceedings it is liable for such amounts of witness fees, attorney fees, and other actual expenses as the court deems just. Arguably, other actual expenses could include reimbursement for relocation costs made in reliance upon the agency's declaration of intention. *Smith v. Erie Rd. Co.*, 134 Ohio St. 135, 16 N.E.2d 310 (1938), recognized that recovery for damages resulting from an abandonment might be permitted if a wrongful act and resulting injury were shown. The California Code permits the court to prohibit abandonment if a party's position has substantially and detrimentally changed in justifiable reliance upon the proceedings. Cal. Civ. Proc. Code 1255a(b) (West Supp. 1965).

²⁵ This interpretation is supported by an analysis of related sections which indicate that a declaration of intention must be filed in order for an agency to obtain default judgment. Section 163.09 provides for default judgment in the amount of the deposit as set forth in the petition. Since § 163.05 does not require this amount to be set forth in the petition, and since § 163.12 clearly indicates that it should not be set forth in the petition because of its possible misuse by the jury, § 163.09 is obviously referring to the amount required to be set forth in the declaration of intention.

After it files its declaration of intention, the agency must comply with two other requirements before it may take immediate possession under section 163.06. It is required to deposit with the court an amount which it considers to be just compensation for the property.²⁶ The purpose of requiring a deposit is to provide immediate compensation which the owner can withdraw and use to finance the cost of his relocation. The amount withdrawn is deducted from the amount of the final verdict. In order to protect the agency against possible loss if the deposit should exceed the amount of the verdict, the act provides that the land owner may not withdraw more than eighty per cent of the deposit.²⁷ It would seem that in addition the landowner should be protected against the possibility of an unreasonably small deposit.²⁸ The purpose of requiring a deposit would be defeated if an agency could take possession after making a nominal deposit. Therefore, a court should refuse to enter an order granting possession to the agency if it finds that the deposit was not a reasonable and good faith estimate of just compensation. This interpretation of the court's power is supported by the language of the statute. Section 163.06 provides that the deposit shall be the value of the property as determined by the agency. On the one hand, this section seems to require that the value of the property be deposited. On the other hand, it seems to give the agency the right to determine the amount. Considering the agency's interest in a minimal determination, there is sufficient ambiguity in the provision to permit the courts to construe it to mean that the agency shall make the initial determination of value subject to the power of the court to deny the right of immediate possession if the amount deposited is not a good faith and reasonable estimate of value. This interpretation is supported by decisions construing section 258(a) of the United States Code.²⁹

The final requirement for immediate possession under section 163.06 is the court's entry of an order of possession. Although section 163.06 does not expressly make a court order a prerequisite to pos-

²⁶ According to the language of the statute, which is based on prior case law, just compensation includes the value of the property taken plus the damages, if any, to the residue. Damages to the residue arise when there is a taking of part of a larger parcel. The jury is asked to determine the shrinkage in value to the remainder caused by the partial taking. 1 Richards and Knepper, *Ohio Judicial Conveyances and Eminent Domain*, §§ 746-48 (1960).

²⁷ Ohio Rev. Code Ann. § 163.06(C) (Page Supp. 1965).

²⁸ Several other states afford this protection to the owner. See, e.g., Cal. Civ. Proc. Code 1243.5 (West Supp. 1965); Ill. Ann. Stat. tit. 47, § 2.2 (Smith-Hurd Supp. 1965).

²⁹ *United States v. 51.8 Acres of Land*, 147 F. Supp. 356 (E.D.N.Y. 1956); *United States v. 48,752.77 Acres of Land*, 50 F. Supp. 563 (D. Neb. 1943).

session, section 163.15 provides that when an agency is entitled to possession the court shall enter an order to such effect upon the record, and, if necessary, process shall be issued to place the agency in possession. For the reasons hereafter mentioned, the date of the agency's right to possession should be fixed by court order. Therefore, section 163.15 should be construed to require that an order of possession be entered before immediate possession may be taken under section 163.06. Before granting the order, the court should determine if the agency is in fact entitled to immediate possession. The court may find that immediate possession is not allowed by the constitution. The agency may have failed to file a declaration of intention with its petition, or its deposit may not have been a reasonable and good faith estimate of value. If a court should refuse to consider these questions, great harm could be inflicted upon the owner by an agency's unlawful entry upon his land. Both the landowner and the agency are protected if the court considers these questions before entering an order granting possession to the agency.³⁰ When determining whether an order of possession should be granted, the court should also consider whether immediate possession would cause undue hardship to the owner. It may be apparent that the agency's right to possession should be postponed for several weeks while the owner has an opportunity to locate elsewhere. An obvious purpose of the act is to preclude either party from obtaining an unfair advantage in negotiations. The courts should not permit an agency to use its right of possession to compel the owner to concede to an unjust settlement. A liberal interpretation of the courts' discretion would further the objectives of the act.

C. *Structures*

Even though an agency is permitted by the constitution to take immediate possession and even though it has complied with the three requirements of section 163.06, the extent of the agency's right to possession may be limited. This limitation relates to the right to take immediate possession of structures situated on the land. Section 163.06 (B) provides that an agency appropriating property for the purpose of making or repairing roads may take possession and remove structures sixty days after service of summons upon the land owner. Although section 163.06(A) does not permit immediate possession of structures in any other situation, section 719.33 allows for possession

³⁰ Other states have made express provision for a hearing to determine if an agency is entitled to immediate possession. See, e.g., Cal. Civ. Proc. Code § 1243.5 (West Supp. 1965); Ill. Ann. Stat. tit. 47, § 2.3 (Smith-Hurd Supp. 1965); Pa. Stat. Ann. tit. 26, § 1-406 (Supp. 1965); Va. Code Ann. § 25-46.17 (1964).

of structures six months after service where land is taken by municipalities for urban renewal projects. Since section 163.02 provides that "all appropriations of real property, except as otherwise authorized by this section, shall be made pursuant to sections 163.01 to section 163.22," it is apparent that section 719.33 was overlooked by the draftsmen of the act. In order to avoid defeating legislative intent, courts should permit immediate possession of structures pursuant to section 719.33 until the conflict is resolved by appropriate legislation.³¹

The Uniform Act's special treatment of structures is based on two reasons which require further examination. The first reason is that the agency's possession or removal of structures before trial interferes with the valuation of the property. A party is ordinarily entitled to have the jury view the premises. It is felt that if the jury can view the premises with the structures still intact, it is more likely to reach a just verdict.³² Thus, structures may be removed before trial only in the case of road and urban renewal projects. Moreover, in these two cases, an elaborate procedure is provided for preserving evidence of the structures' value. Section 163.06 provides that upon motion of the agency the court shall have appraisals made, shall cause pictures to be taken, and shall compile a complete description of the structures. It would seem that if the agency attempted to take possession of the structures without first filing the motion, its entry would be unlawful. The procedure was clearly designed for the protection of both parties. Its purpose was to provide a substitute for a party's right to have the jury view the premises with the structures intact. Since neither party is intended to gain an unfair advantage from the removal of structures before trial, the procedure should be construed to be a prerequisite to immediate possession of structures. It may seem curious that the Ohio act places so much importance upon the jury's view of the premises since the Ohio courts have long held that the view is not evidence in the case.³³ Arguably, however, the required data helps the jury understand the testimony of expert witnesses. If it does, the cost of the

³¹ Corrective legislation may be unnecessary for two reasons. First, § 719.33 may be unconstitutional. Whether an urban renewal project constitutes a public exigency within the meaning of article I, § 19 is apparently an unsettled constitutional question. Second, the act is not effective after November 1, 1970. 130 Ohio Laws 1780 (1963).

³² *In re Appropriation for Highway Purposes*, 90 Ohio App. 471, 107 N.E.2d 387 (1951). See Duffey, "Condemnation of Structures," 16 Ohio St. L.J. 462 (1955); Comment, "Eminent Domain: Corduroy Road to Ohio's Super Highways," 9 W. Res. L. Rev. 457 (1958).

³³ *Zanesville, Marietta & Parkersburg Rd. v. Bolen*, 76 Ohio St. 376, 81 N.E. 681 (1907).

procedure is justified. But if neither party plans to use the data in its presentation to the jury, the procedure should be waivable by mutual consent.

The second reason for the special treatment of structures is that the land owner needs a reasonable time to relocate his home or business. There is a distinction between permitting an agency to take immediate possession of the land and permitting it to take immediate possession of the structures upon the land. While the agency's immediate possession of the land surrounding the structures may be annoying to the owner, the public interest arguably requires that he bear the annoyance. But if he were additionally required to evacuate the structures immediately, he would be forced to move his home or business at a moment's notice. The existence of such a threat would place the owner at a distinct disadvantage in negotiations. For this reason the act recognizes the owner's need for a reasonable time to relocate by postponing the agency's right to take possession of structures. Only when land is taken for roads or urban renewal projects may structures be taken before trial. In both of these cases the statute should be interpreted to permit the owner adequate time to relocate. Section 719.33 provides that the agency shall not take possession of land and structures until six months after service. But section 163.06(B) grants the agency the power to take immediate possession of both land and structures. It also provides, however, that the owner shall vacate the structures within sixty days. In order to strike a just balance between the agency's interest in immediate possession and the owner's interest in a reasonable time for relocation, section 163.06(B) should be construed to postpone the agency's right to take possession of the structures for sixty days.

A problem is raised by permitting the agency to take possession of the land and at the same time postponing its right to take possession of the structures. At what point does the agency's right to the land conflict with the owner's right to the structures? If the reasons for the separate treatment of land and structures are considered, it would seem that the agency should be permitted to do anything it wishes with the land so long as it doesn't substantially interfere with the owner's right to maintain his home or business on the premises during the relocation period. It is suggested that upon motion of either party the courts should determine what constitutes substantial interference. In this manner a just balance can be found between the agency's desire for immediate possession and the owner's need for a reasonable time to relocate.

III. CONSEQUENCES OF TAKING POSSESSION

The next question considered is what are the consequences of the agency's taking possession. This question raises the crucial problem of determining what event establishes the date of taking. Establishment of the date of taking is important for several reasons: first, section 163.21 provides that if the agency has taken possession, it may not abandon the proceedings. Second, section 163.17 provides that when an agency takes possession before trial, interest on that part of the verdict which was not withdrawable runs from the date of taking. Third, sections 319.20 and 319.201 provide that taxes shall be apportioned as of the date ownership is transferred. Fourth, case law prior to the act established the rule that if possession is taken before trial, the property is valued as of the date of taking. The problem is to choose an ascertainable date of taking which is consistent with the purposes of the act.

A. *Date of Taking Before Trial*

According to case law prior to the act, the date of taking is the date of trial unless possession is taken before trial.³⁴ The first question considered will be what event establishes possession before trial under the new law. Case law prior to the act indicated that a taking may occur in either of two situations: first, an entry upon the land which manifests an intent to exercise dominion over the property,³⁵ or second, an entry upon the land which constitutes a substantial interference with the owner's right to use and enjoy the property.³⁶ In either situation a physical entry is required. But the characterization of a particular entry as a taking often involves a difficult factual determination. This difficulty is compounded under the Uniform Act because section 163.03 permits the agency to enter for the purpose of making surveys, soundings, drillings, appraisals, and examinations. The policy behind the law of conveyancing would seem to require that a transfer of property be evidenced by a more formal and definitive event. An event which meets these objections to the prior case law rule is the entry on the record of the court order granting possession to the agency.³⁷ It is clear that by obtaining the order, the agency manifests an intent to take dominion and substantially interferes with the owner's

³⁴ *Director of Highways v. Olrich*, 5 Ohio St. 2d 70, 213 N.E.2d 823 (1966).

³⁵ *Cincinnati v. Smallwood*, 106 Ohio App. 496, 150 N.E.2d 310 (1958).

³⁶ *Director of Highways v. Joseph Evans Ice Cream Co.*, 167 Ohio St. 463, 150 N.E.2d 30 (1958); *City of Norwood v. Sheen*, 126 Ohio St. 482, 186 N.E. 102 (1933).

³⁷ Ohio Rev. Code Ann. § 163.15 (Page Supp. 1965).

right to use and enjoy the property.³⁸ After the order has been entered by the court, he no longer has any legal right to possession. He can be lawfully evicted at a moment's notice. After that it can no longer realistically be said that he has any dominion or control over the property.³⁹ For these reasons the courts should hold that the date of taking before trial is established by the court order granting possession to the agency. Therefore, after that date the agency should not be permitted to abandon the proceedings.⁴⁰ Moreover, interest should commence,⁴¹ taxes should be apportioned,⁴² and the date of valuation should ordinarily be established as of that date.⁴³

The above analysis raises a problem which requires further consideration. How can the order granting possession to the lands establish the date of taking if the owner retains the right to remain in the structures? If title vests in the agency at the date of the order of possession, it would seem that an occupant of the structures after that date should be liable for rent.⁴⁴ A solution to this problem is reached by balancing the agency's interest in immediate possession against the owner's interest in a reasonable period for relocation. Arguably, the act gives the land owner a tenancy in the structures at the agency's expense during the relocation period. By excusing the payment of rent,

³⁸ *In re* Appropriation for Highway Purposes, 90 Ohio App. 471, 104 N.E.2d 186 (1951), held that filing of a resolution and finding by the director of highways did not fix the date of taking. A resolution and finding required by section 5519.01 should, however, be distinguished from the declaration of intention required by § 163.06. The former is used both to initiate the proceedings and to permit immediate possession. The latter is used solely for the purpose of manifesting an intention to take immediate possession. Unlike the resolution and finding the declaration of intention need not be filed if the agency does not desire immediate possession.

³⁹ See California Law Revision Comm'n, *op. cit. supra* note 12, at B-45:

If the condemnor fails to take physical possession after obtaining an order of immediate possession, the order itself is an effective block to the owner's use of the property. Since the condemnor may at any time thereafter enter upon and use the property, the cloud that hangs over the property clearly prevents the condemnnee from doing anything with it. It is an exaggeration to say that he still owns the property.

⁴⁰ Ohio Rev. Code Ann. § 163.21 (Page Supp. 1965).

⁴¹ Ohio Rev. Code Ann. § 163.17 (Page Supp. 1965).

⁴² Ohio Rev. Code Ann. § 319.20, .201 (Page Supp. 1965).

⁴³ *Director of Highways v. Olrich*, *supra* note 34, reaffirmed the established case law rule that the property is valued as of the date of trial unless possession is taken prior thereto. But there may be circumstances when the date of valuation should not coincide with the date of taking. *City of Cleveland v. Carcione*, 118 Ohio App. 525, 190 N.E.2d 52 (1963).

⁴⁴ The Illinois act permits a court upon a finding of undue hardship to postpone the agency's right to take possession. But the owner is required to pay a reasonable rental while he remains on the premises. Ill. Ann. Stat. tit. 47, § 2.3 (Smith-Hurd Supp. 1965).

the act affords the owner some compensation for the expense and hardship of relocation.⁴⁵ During the land owner's tenancy, the agency has the right to proceed with its project so long as it doesn't substantially interfere with the owner's right to maintain his home or business upon the premises during the relocation period. The entry of a court order of possession should constitute a taking subject to the tenancy granted by the act to the land owner.

B. *Date of Taking at Time of Trial*

Next to be considered is the case law rule that if there is no prior taking, the taking occurs at the time of trial.⁴⁶ The constitution expressly provides that except in the two instances where immediate possession is expressly allowed, property may not be taken until compensation is first paid or secured by deposit.⁴⁷ Therefore, the case law rule conflicts with the language of the constitution since compensation is ordinarily not paid or deposited with the court until some time after the trial. But aside from its constitutional infirmities, the case law rule seems incompatible with section 163.15 of the Uniform Act. That section provides that the agency shall have no right to take possession until after it either pays the amount of the award to the owner or deposits it with the court. Payment need not occur until months after the trial. In fact possession by the agency might never occur because section 163.21 permits the agency to abandon the proceedings up to ninety days after judgment. If the case law rule were applied to the Uniform Act, the vesting of title to the property would have no relation to the right of possession. Taxes would be apportioned as of the date of trial even though the agency might not take possession until three months later. For these reasons it is clear that if the case law rule is followed under the Uniform Act, it will be based upon a fiction. In a realistic sense, the taking does not occur until the agency has the right to take possession of the property.

A closer examination of the cases enunciating the rule reveals why the date of taking was fixed at the time of trial. These cases were concerned with the date on which the property should be valued.⁴⁸

⁴⁵ The traditional rules for arriving at just compensation fail to recognize many losses caused to the owner by an exercise of eminent domain. Comment, "Eminent Domain in an Age of Redevelopment: Incidental Losses," 67 Yale L.J. 61 (1957).

⁴⁶ Director of Highways v. Olrich, *supra* note 34.

⁴⁷ Ohio Const. art. I, § 19 and art. XIII, § 5.

⁴⁸ Director of Highways v. Olrich, *supra* note 34; Director of Highways v. Joseph Evans Ice Cream Co., *supra* note 36; Nichols v. City of Cleveland, 104 Ohio St. 19, 135 N.E. 291 (1922); Board of Educ. v. Hecht, 102 Ohio App. 521, 130 N.E.2d 107 (1955); *In re Appropriation of Easement for Highway Purposes*, 90 Ohio App. 471, 107 N.E.2d 387 (1951).

The jury must value the property as of a certain date. The valuation date is important because it determines which party must bear casualty losses. It also establishes for what improvements the owner may be compensated. Furthermore, fluctuations in market price are fixed as of the date of valuation. There are sound reasons for making the trial the date of valuation. In the first place, this is the date at which the jury views the premises, and it can be argued that the property should be valued as of the date it is examined by the jury.⁴⁹ Furthermore, expediency would seem to require that the property be valued no later than the time of trial. Otherwise the jury would be compelled to speculate on the future value of the property. What if there were a casualty loss after trial but before the date of valuation, or the owner added an improvement? What if the real estate market suddenly collapsed? None of these factors would have been considered by the jury. Arguably, a new trial would be necessary. In order to avoid this difficulty, the date of valuation should continue to be fixed no later than the time of trial. But this does not mean that the taking must occur at the time of trial. Although prior to the act the courts generally assumed that the date of valuation and the date of taking were inseparable, there is no reason why the two dates must coincide under the Uniform Act. Under the act there is clearly no taking until the court enters an order granting possession to the agency.⁵⁰ This may not occur until long after the trial. Nonetheless very practical reasons require that the date of valuation be fixed no later than the date of trial. The courts should recognize that the two dates are based on different considerations. An appropriation proceedings serves two functions. One function is to ensure that the owner receives just compensation. The date of valuation relates to this function. A separate function is to administer the transfer of title and possession from the owner to the appropriating agency. The date of taking relates to this second function. The determination of each date should be based on different considerations. The date of taking should be established when the right of possession to the property is transferred to the agency, but the transfer of possession is just one of many factors which should be considered in establishing a fair and expedient date of valuation.

C. *Date of Valuation*

The failure of the courts to recognize that the date of valuation need not coincide with the date of taking has resulted in injustices and unclear analyses of cases. The reasoning of two Ohio cases will

⁴⁹ *In re Appropriation for Highway Purposes*, *supra* note 48.

⁵⁰ Ohio Rev. Code Ann. § 163.15 (Page Supp. 1965).

be compared to illustrate the problem. In both *Akron v. Alexander*⁵¹ and *City of Cleveland v. Carcione*,⁵² the jury was asked to value a building which, as of the date of trial, was situated in the midst of a desolate urban renewal project. The building was dilapidated and had been the victim of vandalism. When the urban renewal project was commenced, the building stood in the midst of a busy neighborhood. At that time it was occupied and reasonably maintained. But in both cases the jury was instructed to value the property as of the date of trial. In accordance with a long established rule of valuation, the jury was also told that the property should be valued as if the urban renewal project had never been commenced.⁵³ In each case the trial court was requested to permit the jury to view the premises. Both *Carcione* and *Alexander* held that despite the apparent mandatory language of the statute, the trial court had power to deny a request that the jury view the premises. The divergent reasoning of the two decisions illustrates the difficulty courts have had in separating the date of taking and the date of valuation. In *Alexander* the supreme court reaffirmed the traditional rule that the property should be valued as of the time of trial since that was the date of taking, but held that a trial court could refuse to grant a request that the jury view the premises if that view would be prejudicial to the owner. The court's application of the traditional rule in *Alexander* was based upon a fiction. The reason for saying that the date of taking occurs at the time of trial is that there are practical reasons for fixing the date of valuation at the time of trial and it is assumed that the date of taking must coincide with the date of valuation. But by denying the jury a view of the premises, the court removed the reason for valuing the property at the time of trial. Therefore, there was no reason why the taking must occur at the time of trial. The reasoning of the court of appeals in *Carcione* is more persuasive. The court held that due to the circumstances of the case the property should be valued at a date just prior to the initiation of the urban renewal project. It recognized the rule that property is valued at the time of trial, but then stated:

However, the application of that rule of law may result in an award of compensation to the owner of the property appropriated, which is unreasonable and unjust under unusual facts and circumstances, as are present at bar. Under such circumstances, the time as of which the valuation of the property should be made must comport with the peculiar facts and circumstances of the case so as to assure

⁵¹ 5 Ohio St. 2d 75, 214 N.E.2d 89 (1966).

⁵² *Supra* note 43.

⁵³ *Nichols v. City of Cleveland*, *supra* note 48.

the owner of the property compensation in money which is just as contemplated by the constitution of Ohio.

The reasoning of *Carcione* represented a breakthrough in judicial thought and its application should be extended. In contrast the reasoning of the Ohio Supreme Court's recent decision in *Director of Highways v. Olrich*,⁵⁴ which reaffirmed the traditional rule, seems oblivious to the real considerations involved in fixing the date of valuation. It is most unfortunate that in *Olrich* the court limited the *Carcione* reasoning to its facts.

In factual situations like *Carcione*, *Olrich*, and *Alexander*, the reasoning of the supreme court is unsatisfactory for several reasons: (1) A practical reason for valuing the property as of the time of trial is that the jury views the premises at that date. But if the jury is not permitted to view the premises because the view would be prejudicial to the owner, what reason remains for valuing the property as of that date? (2) It is impractical to ask expert witnesses and jurors to value property situated in the midst of a neighborhood which has been demolished by a public project as if the project had never been initiated. Value is based to a large extent upon the neighborhood surrounding the property. If a neighborhood has been destroyed by the public project, the jurors and expert witnesses are compelled to guess what the neighborhood would have been like and how the property could have been used if there had been no project. Just compensation should not be based upon mere conjecture. (3) If the property is valued at the date of trial, the owner is compelled to bear the increased risk of vandalism and other casualty losses caused by the urban renewal project. This seemingly conflicts with the rule that the property should be valued as if the project had never been commenced. (4) In order to receive just compensation, the owner must make expenditures to protect, maintain, and improve structures which no longer serve any useful social function. This is economically indefensible. (5) The language of article 1, section 19 of the Ohio Constitution and section 163.15 of the Uniform Act indicate that the agency may not lawfully take possession until after compensation is paid to the owner or secured by deposit with the court. Therefore, neither the constitution nor the statute manifests an intent that the taking must occur at the time of trial.⁵⁵ In fact, an entirely different intent is manifested. For these reasons it should be recognized that the date of valuation need not coincide with the date of taking. Nor does the date of valuation have

⁵⁴ *Supra* note 34.

⁵⁵ *Director of Highways v. Olrich*, *supra* note 34. The supreme court suggested in *Olrich* that the traditional rule is based on constitutional and legislative intent.

to be fixed at the time of trial. It should be based on considerations of fairness and expediency. The rule requiring valuation at the date of trial should be no more sacred than the practical considerations upon which it is based.

CONCLUSION

The functions of the courts in an appropriation proceeding are to ensure that the owner receives just compensation and to administer the involuntary transfer of title and possession from the owner to the appropriating agency. Those provisions of the new Eminent Domain Act which relate to the transfer of title and possession should be interpreted to strike a just balance between the agency's interest in immediate possession and the owner's need for a reasonable time to relocate. If either party is permitted to use the proceeding as a club to coerce an unjust settlement, the purpose of the act is defeated. The Uniform Act should also be used as a basis for clarifying present case law relating to the date of taking and the date of valuation. If properly interpreted, the act should effect a vast improvement in the eminent domain law of Ohio.

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